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DISTRICT I

June 2, 2017

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You are hereby notified that the Court has entered the following opinion and order:

2016AP973-CR State of Wisconsin v. Davon Terrell Smith (L.C. # 2004CF7217)

Before Brennan, P.J., Kessler and Dugan, JJ.

Davon Terrell Smith, *pro se*, appeals from an order of the circuit court that denied his motion for sentence modification. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm the order.

In 2005, Smith was convicted by a jury on one count of second-degree intentional homicide while armed and one count of possession of a firearm by a felon. He was given

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

twenty-seven years' imprisonment for the homicide and a concurrent six years' imprisonment for the firearm possession. He filed a postconviction motion, which was denied. He filed an appeal, in which we affirmed his conviction. *See* ***State v. Smith***, No. 2007AP1878-CR, unpublished slip op. (WI App Jul. 8, 2008). In 2009, Smith filed a *pro se* motion to vacate a DNA surcharge, which the circuit court granted.

In 2016, Smith filed the underlying "motion for modification of sentence" in which he claimed there was a new factor. Specifically, he identified the "unknowingly overlooked fact that Smith was entitled to rely on his mild mental retardation diagnosis as a mitigating factor during sentencing."

The circuit court denied the motion.[2] It noted that Smith's diagnosis was known to the sentencing court, evidenced by its express statement, pointed out by Smith, that it did not view the diagnosis to be a mitigating factor. Smith's contention that the sentencing court had not properly considered the diagnosis as a mitigating factor was instead a claim that the sentencing court erroneously exercised its sentencing discretion. However, the circuit court noted, the time for such a challenge had expired and was not available through WIS. STAT. § 974.06. Smith moved for reconsideration, which was also denied. Smith appeals.

A new factor is a fact or set of facts that is highly relevant to the imposition of sentence but was unknown to the sentencing court at the time of the original sentencing either because it was not then in existence or because, even though it was in existence, it was unknowingly

[2] The Honorable Karen E. Christenson had presided over Smith's trial and imposed sentence. The Honorable William W. Brash, III, heard the postconviction motion following trial and the 2009 DNA motion. The Honorable J. D. Watts denied the new-factor motion that is the subject of this appeal.

overlooked by all of the parties. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant has the burden to demonstrate the existence of a new factor by clear and convincing evidence. *See* ***State v. Ninham***, 2011 WI 33, ¶89, 333 Wis. 2d 335, 797 N.W.2d 451. Whether the defendant has met that burden is a question of law we review *de novo*. *See* ***State v. McDermott***, 2012 WI App 14, ¶9, 339 Wis. 2d 316, 810 N.W.2d 237.

Smith's "mild mental retardation" diagnosis was known to the sentencing court; it had been described in a sentencing memorandum prepared by Ana Maria Guzman, a client services specialist in the State Public Defender's office, and intended to supplement the presentence investigation report. The sentencing court acknowledged reading about Smith's "mental situation," but commented, "I hope that you were not bringing that all up because you thought that somehow his mental situation, whether he is borderline or what his situation is, whether that mitigated his actions or maybe somehow it should go to excusing his conduct and choices, because obviously it cannot do that." This clearly indicates that Smith's mental retardation was not a fact "unknown to the sentencing court at the time of the original sentencing" and, thus, it cannot be a new factor.

In his reply brief, Smith asserts that the "centerpiece" of the issue on appeal "is that the sentencing judge failed to consider Ms. Guzman's report as mitigating evidence" and clearly considered his mental state to be aggravating. He complains that the sentencing court failed to "consider his unique character" when it refused to consider his "diminished capacity" as a

mitigating factor.[3] These complaints only highlight the fact that Smith's diagnosis is most assuredly *not* a new factor.

Smith's complaints also bolster the circuit court's conclusion that Smith is instead challenging the sentencing court's exercise of discretion.[4] It is well established that the weight to be given to a particular sentencing factor—including whether something is an aggravating or mitigating factor—is within the wide discretion afforded to a sentencing judge. *See* ***State v. Grady***, 2007 WI 81, ¶31, 302 Wis. 2d 80, 734 N.W.2d 364; ***State v. Thompson***, 172 Wis. 2d 257, 264-65, 493 N.W.2d 729 (Ct. App. 1992). The time for a challenge to the circuit court's sentencing discretion is either ninety days or as circumscribed by the procedure set out in WIS. STAT. RULE 809.30 for a direct appeal. *See* WIS. STAT. § 973.19. As the circuit court noted, those opportunities have long since passed.

Therefore,

IT IS ORDERED that the order is summarily affirmed.

[3] We reject Smith's attempt to invoke the standards of WIS. STAT. § 971.15 ("Mental responsibility of defendant"), as Smith did not plead not guilty by reason of mental disease or defect.

[4] Smith complains about the recharacterization of his argument, noting that the supreme court in ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, reviewed Harbor's new-factor claims related to mental health issues under new-factor analysis rather than sentencing discretion. However, there were two at least impliedly new factors present in Harbor. *See* ***id.***, ¶¶53-66. The circuit court denied relief after concluding that neither factor justified sentencing modification, and the supreme court affirmed those discretionary choices. *See* ***id.***, ¶¶63, 65.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals